

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Albert S. Kelly,

Petitioner,

v.

Warden Kirkland Correctional Institution,

Respondent.

C/A No. 4:15-cv-1518-TLW

ORDER

Petitioner, appearing *pro se*, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF No. 1. The matter was referred to Magistrate Judge Rogers and now comes before this Court for review of his Report and Recommendation (R&R). ECF No. 57. In the R&R, the Magistrate Judge recommends that the Court grant Respondent's motion for summary judgment. Petitioner filed objections to the R&R. ECF No. 60. Respondent filed an objection to one issue addressed by the Magistrate Judge, but agrees with the recommendation of summary judgment in its favor. ECF No. 59. This matter is now ripe for decision.

In reviewing the R&R, the Court applies the following standard:

The magistrate judge makes only a recommendation to the Court, to which any party may file written objections The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a *de novo* determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Hous. Auth. of City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992) (citations omitted).

In light of the standard set forth in *Wallace*, the Court closely reviewed the R&R, the objections, and the record in this case.

Petitioner's objections essentially restate the arguments advanced in his habeas petition and his brief opposing summary judgment. *Compare* ECF No. 60 *with* ECF Nos. 1, 41. Petitioner also filed a number of documents after the R&R was entered, including a letter from another prisoner addressed to the Court and correspondence between Petitioner and his PCR counsel. ECF Nos. 60, 63, 65, and 66. To the extent these documents constitute competent evidence in this case, they were not timely produced for consideration in this matter. Nonetheless, out of an abundance of caution and in light of Petitioner's *pro se* status, this Court reviewed these filings and concludes they do not change the Magistrate Judge's analysis and this Court's conclusion that federal habeas relief is not warranted on Petitioner's claims.

Respondent does not object to the Court granting summary judgment in its favor. Respondent disagrees, however, with the Magistrate Judge's suggestion that the record does not support the PCR court's conclusion that trial counsel was not deficient in declining an alibi charge. ECF No. 59 at 1. As noted by Respondent, the record reflects that trial counsel made a strategic decision not to request an alibi instruction when asked by the trial judge if he wanted alibi charged. *Id.* at 4. In light of the record evidence and the deferential review afforded by 28 U.S.C. § 2254(d), this Court concludes the PCR court's analysis on this issue was correct. The Court notes that this objection has no impact on the ultimate conclusion reached by the Magistrate Judge—as explained in the R&R, even assuming error on the part of trial counsel, Petitioner's ineffective assistance of counsel claims fail because Petitioner cannot show he was prejudiced. ECF No. 57 at 19 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

After careful consideration, Petitioner's objections are overruled. The R&R is hereby

accepted (with the additional analysis related to alibi as stated in this Order). For the reasons articulated by the Magistrate Judge, Respondent's motion for summary judgment is granted.

The Court has reviewed the Petition for Writ of Habeas Corpus, ECF No. 1, pursuant to 28 U.S.C. § 2254 in accordance with Rule 11 of the Rules Governing Section 2254 Proceedings. The Court concludes that it is not appropriate to issue a certificate of appealability as to the issues raised in this petition. Petitioner is advised that he may seek a certificate from the Fourth Circuit Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

s/ Terry L. Wooten
Chief United States District Judge

July 18, 2016
Columbia, South Carolina